

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN L. MAY,
Appellant,

v.

U.S. POSTAL SERVICE,
Agency.

DOCKET NUMBER
NY07529010571

DATE: NOV -1 1991

John L. May, Brooklyn, New York, pro se.

Michelle Green, Brooklyn, New York, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the December 14, 1990 initial decision, that dismissed his appeal for lack of jurisdiction. For the reasons set forth below, the Board hereby GRANTS the appellant's petition for review under 5 U.S.C. § 7701(e), VACATES the initial decision, and REMANDS this case to the New York Regional Office for further adjudication and the issuance of a new initial decision consistent with this Opinion and Order.

BACKGROUND

The agency removed the appellant from his position of Distribution Clerk for violation of the terms of a "last chance" settlement agreement. Specifically, the agency charged the appellant with failing to comply with the terms and conditions of the agreement by being late for duty on eight days from January 3 - May 16, 1989; failing to report for duty on 10 occasions, totalling 168 hours, from December 29, 1988, through May 5, 1989; abusing his personal leave time, and failing to enroll and participate in an Employee Assistance Program. The agency also considered elements of his past disciplinary record. See IAF, Tab 3, Exhibit No. 2.

On August 30, 1989, the parties entered into a written settlement agreement. See IAF, Tab 3, Exhibit No. 3. Under the terms of the settlement, the parties agreed that the agency would modify the proposed penalty of removal to a suspension. In return, the appellant agreed to serve a one-year probationary period, beginning on the date of his return to duty. In addition, the appellant agreed that any further attendance-related infractions during the probationary period would result in his removal from the agency. Moreover, the appellant agreed to waive his right to appeal to the Merit Systems Protection Board or the Equal Employment Opportunity Commission, in the event that he was removed for attendance problems during the probationary period. The agency agreed that any action it took to remove the appellant must be in good faith. *Id.*

On July 24, 1990, the agency removed the appellant, based on his failure to be regular in attendance on eight occasions, his excessive tardiness, and his leaving the workfloor/Postal premises without authorization. See IAF, Tab 3, Exhibit No. 1 (and Subtab 4b).

The appellant appealed the agency's removal action to the Board's New York Regional Office. He contended that the agency acted in bad faith because it had "received full documentation which substantiated [his] need for absence," since his "illness could not be scheduled." He also requested that a hearing be held in the matter. See IAF, Tab 1.

At a prehearing conference, the administrative judge stated that the sole issue before the Board was whether the agency effected the removal pursuant to a last-chance settlement agreement whereby the appellant waived his right to appeal to the Board. See IAF, Tab 7 (Prehearing Conference Tape). He stated, in cancelling a hearing in this appeal, that such a determination could be made on the evidence of record alone. However, the administrative judge allowed the appellant an additional opportunity to make a submission for the record, and he stated to the appellant that he (the appellant) had "to allege something more than just bad faith on the agency's part, if the agency is able to show a basis for its action." *Id.*

The appellant presented two additional submissions (one document was submitted just prior to the prehearing conference, and the second submission was submitted in

response to the prehearing conference order), which raised his allegation again that the agency acted in bad faith in effecting the removal. In addition, he presented a progress report (attached to his second submission) from the urology clinic at the Department of Veterans Affairs, in Brooklyn, New York, which indicated that the appellant appeared to have "a bladder tumor," and that it was found that he had undifferentiated "prostate carcinoma." See IAF, Tabs 6 and 8.

In his initial decision, the administrative judge dismissed the appeal for lack of jurisdiction. He found that the parties had entered into a settlement agreement, whereby the appellant agreed to serve a one-year probationary period, and agreed to waive his right to appeal any removal action taken against him for violation of the agreement. In addition, he found that the agreement specifically informed the appellant that any attendance-related infractions would be just cause for removal. He also found that the parties agreed that any action taken by the agency must be in good faith.

Furthermore, the administrative judge found that the agency's failure to issue a notice of proposed removal did not constitute evidence of bad faith. He next found that the appellant's argument that the agency did not show good faith for removing him while he was ill, after it approved his leave for unscheduled absences related to his medical condition, lacked merit. He found that the agency's action was properly based on the appellant's tardiness and attendance-related

infractions. Finally, the administrative judge found that because the record on the first two charges supported a finding that the agency effected the removal in good faith, he need not address the merits of the third charge. See Initial Decision at 1-4.

In his petition for review, the appellant argues that the agency breached the terms of the last-chance settlement agreement requiring that any action against him be taken in good faith because his absences and lateness were due to illness, that the agency was regularly informed by his physician of the medical condition that caused his absences, that the nature of his medical condition was such that his absences could not be scheduled in advance, and that the reasons he provided for those periods of time were accepted by the agency. See Petition for Review (PFR) File, Tab 1.

ANALYSIS

A settlement agreement is a contract between the parties, the interpretation of which is a question of law. See *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988); *McCall v. U.S. Postal Service*, 839 F.2d 664, 669 (Fed. Cir. 1988). In construing a settlement agreement, the Board must determine the intent of the parties at the time they contracted, as evidenced by the contract itself. See *Greco*, at 560.

The legal validity of "last chance" settlement agreements, in which an appellant waives the right to bring a

future appeal, has been upheld by the Board in *Ferby v. U.S. Postal Service*, 26 M.S.P.R. 451, 456 (1985). The United States Court of Appeals for the Federal Circuit has also held that these types of agreements are valid, provided that such agreements are reviewed to determine whether they are fair to the appellant. See *McCall*, 839 F.2d at 669. Specifically, the court noted that, "[i]f an agency acts in bad faith or takes other arbitrary and capricious action, as a breaching party it would not be able to enforce the agreement." *Id.* at 667. More recently, in *Stewart v. U.S. Postal Service*, No. 90-3382 (Fed. Cir., Feb. 21, 1991), slip op. at 1-8, the United States Court of Appeals for the Federal Circuit examined a case similar to the one at issue here. The court vacated and remanded the Board's decision, finding that where an employee raises a non-frivolous factual issue of compliance with a last-chance settlement agreement, the Board must resolve that issue before addressing the scope and applicability of the appeal rights waiver.

The appellant alleges that the agency acted in bad faith under the circumstances, because neither party, at the time of the agreement, intended the provision of the agreement regarding his attendance and tardiness "to include circumstances beyond [the appellant's] control, such as sudden illness" See PFR File 1, Tab 1. According to the second stipulation of the settlement agreement, the appellant agreed to

[B]e placed on probation for a period of one (1) year commencing the date he is scheduled to report for duty. Any attendance related infractions committed by the appellant during the probationary period will be just cause for his removal from the Postal Service. Any action taken by the Service to remove the appellant must be in good faith (emphasis added).

The appellant argues that the agency ignored the last sentence of this provision, by removing him in bad faith, because his illness was an unforeseen circumstance, and the agency had approved of his leave requests. He argues that the Board should find that the agency violated the good faith requirement of the agreement, inasmuch as his medical condition and his absences and tardiness related to his condition were unexpected, and could not have been scheduled in advance. The appellant alleges that, at the time of the agreement, he believed that he only suffered from a urinary tract infection related to his diabetic condition. However, after exploratory surgery, it was discovered that he had prostate cancer, which was the underlying reason for the symptoms that necessitated his unscheduled lateness and absences. He further states that the agency was continually informed of his progressively worsening medical status,* and that it approved his leave requests. *Id.*

The appellant's argument that the agency may have removed him in bad faith, because his illness was an unforeseen circumstance, and because the agency approved his leave

* The record indicates that the agency did receive documentation about the appellant's condition from the appellant and medical personnel. See IAF, Tab 3, Subtabs 4e and 4g.

some merit. Under the agency's attendance

[E]mployees failing to report for duty ... will be considered absent without leave except in actual emergencies which prevent obtaining permission in advance. In emergencies, the supervisor or proper official will be notified as soon as the inability to report for duty becomes apparent. Satisfactory evidence of the emergency must be furnished later.


See U.S. Postal Service, *Employee & Labor Relations Manual* § 666.82 (1989); IAF, Tab 5, Exhibit No. 4.

Under these circumstances, the record presents a legitimate factual issue of whether the appellant breached the terms of the settlement agreement. The administrative judge should conduct a hearing initially to decide whether the appellant breached the agreement, based on consideration of all three charges. See *Manning v. Merit Systems Protection Board*, 742 F.2d 1424, 1428 (Fed. Cir. 1984) ("it would be appropriate for the [Board] to honor a request for hearing where petitioner's allegations raise non-frivolous issues of fact relating to jurisdiction which cannot be resolved simply on submissions of documentary evidence"). See also *McCall*, 839 F.2d at 669. If so, the administrative judge should then proceed to determine the enforceability of the appellant's appeal waiver.

Accordingly, this case is remanded to the New York Regional Office for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board